No. 11975 and No. 12012

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

F. E. NEMEC, *Appellant*,
vs.
UNITED STATES OF AMERICA,
Appellee.
No. 11975

BONEWICZ X. DAWSON, *Appellant*,
vs.
UNITED STATES OF AMERICA,
Appellee.
No. 12012

On Appeal from the District Court of the United States, for the Eastern District of Washington

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BRIEF FOR THE APPELLEE

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STATEMENT OF JURISDICTION

The Circuit Court of Appeals has jurisdiction of the instant case under the provisions of Title 28, Sec. 1291, USCA, and the prosecution in the lower court was based upon Title 18, Secs. 338 and 88, and Title 15, Sec. 77(q).

STATEMENT OF THE CASE

On the 5th day of May, 1948, a United States Grand Jury sitting at Spokane, Washington, returned

an indictment against appellants F. E. NEMEC, BONEWICZ X. DAWSON and others. This indictment in substance charged as follows:

"Count I.

That between January 1, 1945 and continuing to the date of indictment, the defendants, F. E. NEMEC, BONEWICZ X. DAWSON, STANLEY E. RICHARDSON, DR. HAROLD R. RECTOR, WESTCOTT B. CLARKE, FLORA L. CARPENTER, and H. P. SCHWARTZ, conspired, combined, confederated and agreed with each other and with divers other persons whose identity is to the grand jurors unknown * * * * to violate Title 18, Sec. 338, U.S.C.A., by devising * * * * * a scheme and artifice to defraud investors and for obtaining money and property from investors in investment contracts and certificates of interest or participation in profit sharing agreements relating to placer and lode gold mining claims and operations in Sierra and Butte Counties, California, and ore processing operations at Crescent City and Los Angeles, California * * * * to be executed through * * * * the United States mails by means of false and fraudulent pretenses, representations and promises, the defendants well knowing at the time that said pretenses, representations, and promises would be false when made; and,

Violations of Title 15, Sec. 77(q), U.S.C.A., by using * * * the United States mails to employ said scheme and artifice to defraud said investors * * * *.

That said false and fraudulent pretenses, representations and promises included, among others, the following:

1. That said defendants, doing business as Northwest Mining and Engineering Company, a partnership, would and did locate valid, patent-

able, placer mining claims for investors on Government land, open for the location of mineral placer claims, in Sierra County, California, which claims were highly valuable.

2. That under state and federal laws relating to the location of mining claims, no individual or corporation could locate more than one 20-acre placer gold mining claim.

3. That hydraulic placer mining operations on the Sierra County sites had been prevented and rendered illegal by statute and injunction from 1886 until immediately prior to World War II.

4. That the placer mining claims located and to be located for investors had valuable standing timber which could and would be removed and sold by Northwest Mining & Engineering Company, the proceeds of which would inure to the benefit of the claim holders in an amount sufficient to repay the total original investments for their claims.

5. That the placer claims which defendants would and did locate for investors in Sierra County, California, contained values in gold of 40 cents per cubic yard, or over, and would produce net monthly returns to investors of $30.00 for each claim located.

6. That the defendants, doing business as Northwest Mining & Engineering Company, had acquired all necessary water rights, water conduit ditches, and rights of way necessary to enable them to efficiently hydraulic the claims which they would and did locate for investors in Sierra County.

7. That defendants and Northwest Mining & Engineering Company had adequate and ample finances with which to set up and carry on a large scale placer mining operation on claims which they would and did locate for investors.

8. That defendants had arranged for the purchase and operation of the Sierra Butte Mine, the earnings from which would inure to the benefit of all investors for whom defendants located placer mining claims.

9. That the defendants through Northwest Mining & Engineering Company, had discovered in the immediate vicinity of their placer mining operations in Sierra County, California, a vein disclosing valuable gold lode or quartz deposits.

10. That the defendants, through Northwest Mining & Engineering Company, would and did locate for investors valid, legal, lode mining claims consisting of eight such 20-acre lode claims on government land, open for location of lode mining claims, in Sierra County, California.

11. That the lode claims located and to be located in Sierra County, California, by defendants for inevstors had valuable standing timber which could and would be removed and sold by Northwest Mining & Engineering Company, the proceeds from which would inure to the benefit of the claimholders in an amount sufficient to repay the total original investments for their claims.

12. That based upon successful placer mining operations of the Northwest Mining & Engineering Company at Sierra City, California, an early distribution of substantial earnings had been and would be made to investors in lode claims.

13. That the defendants, doing business as Northwest Mining & Engineering Company, would and did locate valid, patentable, placer mining claims for investors on government land, open for location of mineral placer claims, along and adjacent to the ancient Mammouth, Magelia and Nimshew channels in Butte County, California.

14. That defendants could and would operate all said placer mining claims located for investors in Butte County, California, in a single unified underground placer mining operation.

15. That the defendants, through Northwest Mining & Engineering Company, had acquired all necessary mining and tunnel rights to a property in Butte County, California, commonly referred to as the California Treasure Box, Ltd., through which a unified underground placer mining operation on claims located for investors could and would be carried on.

16. That the defendants, through Northwest Mining & Engineering Company, would and did thoroughly and adequately sample and test for gold values the claims in Butte County, California, which they would and did locate for investors.

17. That the defendants, through Northwest Mining & Engineering Company, had performed all necessary preliminary engineering work to permit immediate commencement of underground placer mining operations on claims in Butte County, California, which they would and did locate for investors.

18. That Northwest Mining & Engineering Company had retained the services of Dr. Harold R. Rector, chemist, nuclear physicist, eminent chemical engineer, and key atomic scientist in the development of the atomic bomb at the Hanford Project.

19. That said defendants, doing business as Northwest Mining & Engineering Company and Crescent City Mining Company, had obtained exclusive rights to a secret process invented by Dr. Harold R. Rector by means of which a commercial and highly profitable recovery of gold and other metals could be made from the black

sands and other ores in the vicinity of Crescent City, California."

This count further set forth fifteen overt acts allegedly committed by the defendants in pursuance of said conspiracy and to effect its objective.

"COUNT II.

1. That prior to January 1, 1945, and continuing to November 6, 1947, the defendants, F. E. NEMEC and BONEWICZ X. DAWSON, devised * * * a scheme * * * * to defraud investors * * * * in investment contracts and profit sharing agreements relating to the location and operation of placer and lode gold mining claims in Sierra and Butte Counties, California, and to ore processing operations at Crescent City and Los Angeles, California, by means of fraudulent pretenses, representations and promises, including among others those mentioned in Count I of this indictment and numbered from "1" to "19", inclusive* * * knowing that said pretenses, representations and promises would be false when made.

2. That on the 13th day of December, 1945, * * * * the defendants, F. E. NEMEC and BONEWICZ X. DAWSON, for the purpose of executing the aforesaid scheme * * * * caused to be sent and delivered * * * * by the post office establishment of the United States, a letter addressed to Mr. Henry L. Harris, 921 Snow, Richland, Washington."

"COUNT III"

Count III was dismissed on motion of the United States Attorney prior to the trial.

"COUNT IV.

1. That the defendants F. E. NEMEC and BONEWICZ X. DAWSON, so having devised the scheme and artifice to defraud described in Count I of this Indictment * * * * did in the sale of a security, to-wit: investment contracts and profit sharing agreements relating to location and operation of placer and lode gold mining claims in Sierra and Butte Counties, California, and ore processing operations at Crescent City and Los Angeles, California, by use of the United States mails, employ the said scheme * * * * in the manner following, to-wit:

2. The said defendants on or about the 9th day of November, 1946, * * * * did cause to be delivered by the mails of the United States * * * * a certain letter addressed to Robert L. and Catherine U. Alderson, Route No. 8, Yakima, Washington, the said letter having * * * * on or about the 8th day of November, 1946, been placed * * * * by said defendants in an authorized depository for mail matter to be sent or delivered by the post office establishment of the United States according to the directions thereon."

in violation of Title 15, Sec. 77 (q) (a) (1) USCA, also known as Sec. 17 (a) (1) of the Securities Act of 1933, as amended.

"COUNT V.

1. The grand jury realleges all of the allegations of Count IV of this Indictment except those contained in the second paragraph thereof.

2. The said defendants on or about February, 1946 * * * * did cause to be delivered by the mails of the United States * * * * a certain mimeographed sales brochure addressed to G. E. Hall, 1425 Kimball, Richland, Washington; the said sales brochure having theretofore been

> placed or caused to be placed by the said defendants in an authorized depository for mail matter in Seattle, Washington, to be sent or delivered by the post office establishment of the United States according to the directions thereon."

in violation of Title 15, Sec. 77 (q) USCA, also known as Sec. 17 (a) (1) of the Securities Act of 1933, as amended.

The various counts of the indictment in substance charged that appellants Nemec and Dawson devised a scheme to defraud investors and to obtain money and property from investors by false and fraudulent pretenses, representations and promises. The scheme was a continuing one covering a period from approximately January 1, 1945 to the date of the indictment. In carrying out the scheme, the appellants formed various partnerships and carried out numerous successive promotions from which approximately $180,000 of investors' funds were obtained.

In the first phase of the scheme, appellant Nemec, who will hereinafter be referred to as "Nemec", obtained from appellant Dawson, hereinafter referred to as "Dawson", information relating to certain mining property in the vicinity of Sierra City, Sierra County, California. (Tr. 1373) In early 1945 Nemec formed a Washington partnership with his wife under the name of the Northwest Mining and Engineering Company, hereinafter referred to as "Company", with offices in Seattle, Washington. By personal contacts, as well as by sales brochures and through salesmen, Nemec represented to investors that the Com-

pany had obtained control of a valuable placer property at Sierra City, California and had determined that extensive areas of Government land in the vicinity of this property was open for location of placer mining claims. Investors were solicited to employ the company to locate 20-acre placer mining claims in this area, for a "fee" of $280 each, to be grouped together into 160-acre "association" placer claims, and were assured that when a large area of such claims had been blocked up, the claims would be leased by the Company who would then engage in a large scale hydraulic mining operation on the property which it controlled and on which claims had been located. Claim holders would be paid on a pro-rata basis from the funds set aside from the smelter returns. It was represented that the claims were being offered to Washington residents in order that local California people might not become aware of the Company's plan which possibly might precipitate a gold rush.

Shortly after the sale of placer claims was under way, it was claimed that valuable lode veins had been located in the area and many of the old, as well as the new, investors were induced to become lode claim holders for a fee of $480 per claim. Lode claim holders were to participate both in the returns from the placer operations and in the lode operations.

Coincident with the sale of placer and lode claims at Sierra City, Nemec organized the Sierra City Mining Company, a limited partnership, purportedly to carry on the operations at Sierra City. These

partnership interests were offered at the rate of $1200 for a 1% interest in the earnings after payment of expenses. Partners were promised repayment of their investment from the first earnings of the operation. Although this was to be the working and operating company of the Sierra City enterprise, the books of account of Northwest Mining and Engineering Company disclosed no transfer of assets to the Sierra City Mining Company.

In all, approximately $85,000 was obtained from investors in Sierra City placer and lode claims and partnership interests in the Sierra City Mining Company. (Tr. 1589) While Nemec was active in the raising of funds, Dawson received an expense account and in accordance with his agreement with Nemec, was to share in the ultimate profits. (Tr. 1420)

The majority of the placer and lode claims were actually located upon lands already owned by others under patents or upon land withdrawn from entry and location and it was shown that Nemec had been so advised by both the County Engineer, Taylor, and the Forest Ranger, Delaney. The lode claims were so improperly described that they could not be located or platted. (Tr. 64)

While the Sierra City operations were still being carried on with false pretenses of early dividends, Nemec and Dawson commenced examining additional property in Butte County, California upon which a similar plan of locating placer claims might be followed. Dawson admitted calling this to Nemec's atten-

tion. (Tr. 1423) A campaign was then commenced for the sale of placer mining claims at a "fee" of $385. per 20-acre claim in the area commonly referred to as the Mammoth Channel in Butte County, California. This Mammoth Channel was an ancient river channel covered by a deep lava overcapping. In the sales brochure prepared by Nemec, (Pl. Ex. 55, p. 2176) it was represented that forty 160-acre association placer claims could be located in the area of this channel and operated as a single unit using a plan of underground sluicing through a tunnel under the ancient river channel commencing at a place where Big Butte Creek had cut through the lava overcapping to expose the ancient channel. Maps in cross-section and geographic detail (Pl. Ex. 5) were used by Nemec to present the plan to investors. The tunnel site, necessary for the mining operation as portrayed by Nemec, was claimed to have been acquired by the Company and located on property known as the California Treasure Box, or on property of the Pacific Gas and Electric Company. This fact was denied by the owners of these properties. As shown by the official records and depicted on the map prepared therefrom (Pl. Ex 6), no other land in the area where Big Butte Creek intersects the Mammoth Channel was open for the location of mining claims or for tunnel site purposes. Claims were to be located in a continuous area over the course of the Mammoth Channel as shown on the map exhibited to investors by Nemec.

As in the case of Sierra City claims, many of the Mammoth Channel claims were located upon patented

land and on lands not open to mineral entry because of withdrawal for power site purposes or prior locations. The claims as located were scattered over a thirteen mile area making impossible a continuous unified operation as represented by Nemec. (Pl. Ex. 6, Tr. 104-106) When it became apparent to Nemec and Dawson that claim holders had learned of the invalidity of the claims located for them in this area, Dawson relocated nearly all the claims. Even the relocations, however, were widely scattered and not susceptible to a unified operation and were again chiefly located on power withdrawn lands. (Pl. Ex. 6, Tr. 103-104)

Approximately $40,000 was obtained from investors in the Mammoth Channel promotion and no mining operations of any kind were ever commenced although investors were assured from time to time that operations were about to commence. It is apparent from the invalidity of the claims themselves in addition to their being scattered over a thirteen mile area, that no mining operation could be commenced in this area.

While the sale of claims in Mammoth Channel was still under way, representations were being made by Nemec to investors and prospective investors that an eminent atomic scientist of the Hanford Atomic Energy project, Dr. Harold R. Rector, had become associated with the Company. (Tr. 636) It was represented that Dr. Rector was to head a project for the recovery of gold from black sands at Crescent City by the use of an atomic process which he had

developed. Dawson, Nemec and Rector assisted in obtaining newspaper publicity relating to Rector's achievements and reprints of this article were circulated by Nemec to investors. (Tr. 819) Nemec also had Rector give lectures on the atomic theory to prospective investors coming to Crescent City. (Tr. 960-966) To provide a vehicle for this phase of the scheme, a new partnership was formed known as the Crescent City Mining Company in which interests were offered to investors at the rate of $1200 for a 1% interest, and approximately $60,000 was raised by the sale of these interests. No returns of any kind were paid to investors.

The Government presented substantial evidence that the nineteen specific misrepresentations set forth in the indictment were made to investors by Nemec either in person, through sales literature or through salesmen instructed by Nemec. Substantial evidence was presented proving the falsity of these misrepresentations. Since it would unduly extend this statement to detail the evidence introduced by the Government relating to all of the nineteen misrepresentations, only the most important of those misrepresentations and the evidence refuting same will be referred to.

The essence of the plan by which investors were induced to enter contracts for Sierra City placer claims, Sierra City lode claims, and Mammoth Channel placer claims was the representation that lands in each of these areas were open for the location of the claims. (Tr. 246, 2154, 2176) It was represented that the claims could be patented if desired by the claim holder. (Tr. 143, 180) Ross F. Taylor, a civil

engineer and former County Assessor, testified in refutation of the above report that from his examination of the Sierra County records and Government records, only five of the approximately fifteen association placer claims at Sierra City were not located fully or partially upon patented, previously located land or on power withdrawn areas not open for location. (Tr. 73-78) Similar testimony by Taylor was given relating to lode claims.

In the case of the Mammoth Channel claims in Butte County, the testimony of Martin L. Polk, civil engineer and County Assessor, disclosed that the majority of the thirteen original association claims were located either on land already patented or withdrawn for power site purposes and therefore invalid. Mr. Polk further testified that of the ten relocations of said association placer claims made by Nemec and Dawson, these relocations were almost entirely upon lands withdrawn from mineral entry or for power withdrawal purposes and therefore again invalid. (Tr. 98-106)

As a background for the original offering of mining claims in the vicinity of Sierra City and as explanation for the reason that investors were being solicited to locate placer claims, it was represented by Nemec that no person could file on more than one 20-acre placer claim (Tr. 177-178) and for this reason it was necessary to obtain a large number of investors in order to block up a large area for hydraulic operations. The falsity of this representation is apparent. As correctly instructed by the Court,

no such limitation exists in law, the only limitation being that no person may hold more than one 20-acre placer claim in an association of eight claims.

Sierra City lode and placer claim investors were assured by Nemec that regardless of the outcome of the mining operations, their investments were risk free because sufficient profits could be obtained from the removal of the timber upon claims to repay the amount of the investment. (Tr. 207-208) In addition to the fact that many of the claims were invalid because located on lands not open for mineral entry and consequently timber therefrom could not legally be removed, the Government further refuted this representation through the testimony of Frank B. Delaney, U. S. Forest Ranger in charge of the Sierra City area. Mr. Delaney testified that he was thoroughly acquainted with the claims at Sierra City and the timber thereon and that there was no merchantable timber on any of the claims. (Tr. 409-421.) It was further represented to investors of the Sierra City operation that an option on the Sierra Butte mine had been obtained by Nemec and Dawson on behalf of the Company and that earnings from its operation would inure to the benefit of claim holders. (Tr. 147, 181, 209.) Clarke, one of Neme's salesmen and a defendant in the conspiracy, admitted when impeached by previous testimony given under oath before a Government investigator, that he had made such representations and that Nemec had furnished him the information. (Tr. 1257-1258) To prove the

falsity of such representations, the Government produced as its witness one Elistus L. Hayes whose family has owned the Sierra Butte mine for the past forty years and who testified that although approached by Dawson with reference to an option and a lease on that property, he unequivocally refused then or at any subsequent time to give Dawson or Nemec or the Company any lease, option or right to purchase or operate the mine. (Tr. 451)

It was represented to investors that the claims located along Mammoth Channel in Butte County, California would be operated in a single unified underground placer mining operation and it was further represented that approximately 5400 acres of land had been determined to be available for the location of claims in this area. (Tr. 567-568) The advantages of working the large block of claims in a unified operation were dealt with in considerable detail. As has already been pointed out hereinbefore in our Statement of the Case, the falsity of this representation is apparent from plaintiff's exhibit "6" which shows all of the association placer claims actually placed by Nemec and Dawson on the Mammoth Channel to be scattered over a thirteen mile area making a single unified operation impossible.

It was further represented that a tunnel site in the area of Mammoth Channel had been acquired at the intersection of Big Butte Creek with the claimed course of the Mammoth Channel and this tunnel site was pointed out to investors on the sales map of the Mammoth Channel area used by Nemec and

his salesmen. (Pl. Ex. 79) In this connection some investors were told that the tunnel site was on property known as the California Treasure Box and the Company had control of that property. (Tr. 488) Other investors were told that the tunnel site was on the property of the Pacific Gas and Electric Company and that a lease had been secured with the Pacific Gas and Electric Company for tunnel rights on said property. (Tr. 321, 534-535) To prove the falsity of these representations, the Government called as its witness one Marcel Schmidt who testified that he has been the owner of the California Treasure Box since February of 1945 and that at no time did he execute a lease or option of the tunnel site on said property or any purchase of said property to either of the appellants here or to the Northwest Mining and Engineering Company. (Tr. 807-808) Mr. Cullen W. Coates, a representative of the Pacific Gas and Electric Company and called by the Government as its witness, testified unequivocally that his company had made no lease or given any commitment on its property in the Mammoth Channel area to either of the appellants here or to the Northwest Mining and Engineering Company. (Tr. 692-695) The crux of operations in Mammoth Channel, as explained by Nemec to investors, was based upon possession of a tunnel site at Big Butte Creek. Without the possession of that site the operation outlined by Nemec was impossible.

It was represented to investors and prospective investors that Nemec and the Company had obtained the services of an eminent nuclear physicist, Dr.

Harold R. Rector, and that Dr. Rector had demonstrated a secret process by which gold could be obtained from black sands through the use of atomic processes. (Pl. Ex. 149, Tr. 636) The Rector process was to be used in operations at Crescent City. In proof of the falsity of this misrepresentation, Dr. Rector himself took the stand and admitted that he had no background as an atomic scientist or nuclear physicist but that rather, he was a chiropractor employed at the Hanford Atomic project as a water tester. (Tr. 838-839) Rector further testified that he disclosed his lack of qualifications to Nemec and to Dawson and that the latter commented about his being a chiropractor. (Tr. 877) Rector also under Nemec's direction, gave so-called "fireside chats" to prospective investors coming to Crescent City on his atomic process for gold recovery with the sole purpose of impressing investors and prospective investors. (Tr. 876, 960-966)

APPELLANT NEMEC'S ASSIGNMENTS OF ERROR

The appellant Nemec's assignments of error will be discussed in the order in which they are set forth in the appellant's brief.

ARGUMENT

1. *Answer to Appellant Nemec's Assignment of Error No. 1, viz., That The Verdict, Insofar as the Appellant Nemec is Concerned, is Contrary to Law. The Evidence is Insufficient to Support the Conviction.*

The Appellant Nemec was the President of the Northwest Mining and Engineering Company and

was the principal defendant in the case. Counsel for appellant Nemec stated that the jury was permitted to find a verdict of guilty without the necessary careful discriminating assessment of the guilt of the defendants. The statement is in error as appellant Nemec's counsel at the time of trial were satisfied with the instructions and failed to except thereto. (Tr. 1944) This appellant cites the case of *Kotteakos* v. *United States*, 328 U. S. 750 as authority for the claim that this case was tried upon wrong theory. In the Kotteakos case there were several conspiracies consisting of independent groups unknown to the other, and in this case there was one closely knit group all working together for one common object, to-wit: the swindling of the public by sale of mining claims, mining leases, partnerships and interests in atomic processes—anything to take in the money for one common objective, the enrichment of the appellant F. E. Nemec, the chief partner in the Northwest Mining and Engineering Company.

Nineteen different misrepresentations are charged to the appellant Nemec and his co-conspirators. Appellant's counsel now seeks to go over more than a thousand pages of the record with a high powered magnifying glass and point to certain specific instances where he thinks certain of the misrepresentations have fallen by citing some particular answer of a particular witness to a particular question. The whole matter of these alleged misrepresentations was submitted to the jury by careful and appropriate instructions which satisfied the appellant at the time they were given.

The evidence, when considered as a whole, is conclusive as to the fraudulent nature of the misrepresentations. It is submitted that this Court in reviewing the record at this time must take the view of the evidence which is most favorable to the Government and accept as true all the facts which the evidence reasonably tended to prove.

Boushea v. *United States*, 173 Fed. (2d) 131.

II. *Answer to Appellant Nemec's Assignment of Error No. 2, viz., That the Court Erred in the Admission of Exhibit 211, it Being Highly Prejudicial to the Appellant Nemec on the Theory on Which the Case was being Tried.*

Exhibit 211 is a desist and restraining order restraining the appellant Nemec from selling securities in the State of California. Appellant Nemec testified elaborately as to his employment and life from the year 1907 including the service of a term in the penitentiary for a violation of the Securities Act and subsequent operations in California and Arizona. (Tr. 1486-1500) He carefully omitted the part about a restraining order being entered against him in the State of California. Cross examination as to the California restraining order merely filled in a gap in the picture of a life history which he gave to the jury.

Also, all claims sold to investors were sold to residents of the State of Washington. Appellant Nemec and his salesmen told many of the Washington investors that the reason that these claims were not sold in the State of California where they were located was that if the fact ever became known to

residents in California that the claims were being located there, another California gold rush would be precipitated and the natives in California who were near the scene would have an opportunity of seizing the ground and eliminating outsiders, including the prospective investors in the State of Washington, from being able to get any of the claims. An example of these statements comes out in the testimony of the investor witness Smiley (Tr. 142) and the investor witness Dawes (Tr. 178).

In view of the reason assigned by the appellant for making his claims available to Washington investors—a logical one as far as the investors were concerned as they believed that they were being befriended by the appellant by being permitted to make this investment—the Government in all fairness should be permitted to show another reason why the appellant Nemec was not offering claims in the State of California—because there was a restraining order against him preventing him from so doing.

In view of the evidence it was only equitable and just to submit both these reasons to the jury so that the jury could say which one was more likely to be true—whether or not the appellant was imbued with the philanthropic spirit of aiding Washington investors or whether the California restraining order may have been a motivating force in keeping him from selling his claims in that state.

III. *Answer to Appellant Nemec's Assignment of Error No. 3, viz., That the Court Left a Matter of Law to the Discretion of the Jury in Allow-*

ing Them to Rule as to Whether or Not the Partnership Agreements were Within the Scope of the Securities and Exchange Commission Act.

This assignment of error is argued elsewhere in this brief at page 38 and will not be again argued here.

IV. *Answer to Appellant Nemec's Assignment of Error No. 4, viz., That the Court Erred in Instructions Given.*

As previously explained, no exceptions were taken by appellant Nemec's counsel at the time the Court instructed the jury as to the erroneousness of any of the instructions. In view of that fact, this Court should not at this time consider error in the instructions unless it is of such grevious nature that the Court of its own volition should notice it. Counsel does not so contend.

V. *Answer to Appellant Nemec's Assignment of Error No. 5, viz., That Letters from the Defendants Were Admitted Which Were Entirely Outside the Scope of the Indictment Since They Were Either Written in many Instances Long After the Money had Passed to the Defendants, and thus were not Under any Conceivable Theory Part of the Inducement for which the Money was Passed or were Written After the Finding of the Indictment.*

As has previously been argued in this brief, the enterprises of the Northwest Mining and Engineering Company were continuing from early in the year 1945 down to the return of the indictment in May, 1948. The appellant intended to reload the investors in other enterprises so that the fraud was continu-

ing, the thought in view being to reload each investor as many times as possible in order to obtain as much as the traffic would bear.

These letters which counsel refers to would also be admissible as lulling letters as they were used to communicate with the investors and lull them into a sense of security when the Northwest Mining and Engineering Company had no intent or prospects of ever paying out or performing in accordance with those letters.

Brady v. *United States*, (CCA9) 26 Fed. (2d) 400 Cert. Den. 278 U. S. 621.

Certain letters were admitted after the return of the indictment which were written by the appellant Dawson. These letters were admitted without objection by appellant Dawson's counsel and were admitted under cautionary instruction of the Court to regard them only against Dawson. (Tr. 1458-1459)

VI. *Answer to Appellant Nemec's Assignment of Error No. 6, viz., That the Court Erred in Refusing to Permit the Admission of Exhibit 150 (Tr. 801 and 802) Thereby Depriving the Appellant Nemec of the Oportunity to Prove who Wrote the Article of October 11, Concerning the Qualifications of Dr. Rector.*

Exhibit 150 referred to a page in the Del Norte Triplicate containing an article written by someone connected with the newspaper condemning the Securities and Exchange Commission for certain practices of inconsiderate dealings with mining promotions and lack of enthusiasm for new methods. (Tr. 824) This was the same paper which published laudi-

tory articles of Dr. Harold R. Rector as an eminent scientist, nuclear physicist, and atomic scientist. No showing of materiality to any of the issues in this case can be made about the newspaper article written by some anonymous author condemning the activities of the Securities and Exchange Commission. Even if the Securities and Exchange Commission was guilty of all the vices and inequities charged, such would not detract from the guilt or innocence of the appellants.

VII. *Answer to Appellant Nemec's Assignment of Error No. 7, viz., That a co-defendent was Pleaded Guilty Before the Jury Panel and Then Permitted to Change his Testimony Before the Very Jury Chosen from that Panel. Proper Safeguarding Instructions were not Given by the Lower Court.*

The answer to this argument is set forth fully in this brief, page 34, and will not again be discussed here with the exception that it is submitted that the Court did give proper cautionary instructions in his charge to the jury as to the guilt or innocence of Dr. Rector having an effect on the guilt or innocence of other co-defendants. The Court in his charge to the jury adequately protected the other defendants by the following language:

"The fact that the defendant Harold R. Rector, in your presence, pleaded guilty to the charge of conspiracy shall be disregarded by you in determining the innocence or guilt of all the remaining defendants, for under the terms of the indictment the said defendant Rector is charged with having conspired with some person or persons not known or named in the indictment, other

than and as well as the other defendants, and this he may have done without any involvement of the remaining, named defendants." (Tr. 1929)

It is submitted that this instruction protected the remaining defendants as far as it was humanly possible to do so by any instruction. Counsel assigned as error the giving of an instruction that the witness Harold R. Rector is what is known as an accomplice and that such operates against the credibility of his testimony. (Tr. 1935) This instruction was in favor of the appellants because the jury was told that Rector was an accomplice and that his testimony should be scrutinized with great care.

In any event it may be stated that no exceptions were taken to any of these instructions at the time given and as were required by law and rule of this court. Counsel for appellant Nemec complained that Dr. Rector was guilty of perjury and was not indicted but placed upon probation and assessed no fine. Argument made that Dr. Rector is guilty of perjury and was not sufficiently punished is extraneous to any of the issues in this case and will not be discussed.

VIII. *Answer to Appellant Nemec's Assignment of Error No. 8, viz., That the Court Erred in Permitting Inflamatory Remarks by the United States Attorney in his Argument to the Jury which Remarks had Nothing to do with the Evidence which had been Adduced at the Trial.*

It is now charged for the first time that certain inflamatory statements were made by the United States Attorney in the opening statement and in the

final argument. Certain excerpts from the argument are now quoted and are claimed to be erroneous. No exception was taken at the time these arguments were made by the appellant's learned counsel. The Court gave the usual and cautionary instruction that arguments of counsel are not evidence and not to be considered as evidence and are to be regarded by the jury only insofar as they agree with the jury's recollection of what the evidence was.

This case was long and lasted about three weeks. Testimony was voluminous. The defendants had five counsel part of the time and four during all of the trial. The case was tried in a vigorous manner and at times language was used on both sides that possibly was not the most courteous that could have been used. In view of the intricate issues involved and the length of the evidence, the arguments on both sides were surprisingly free from use of abusive and belligerent language and I believe there was only one or two objections in nearly a day and one-half of final argument.

Counsel for appellant Nemec in his final argument far exceeded the bounds of propriety and called for a vigorous answer. He stated as follows:

> "I'm one of the men of Crescent City. My father was one also. If I felt, if I knew I'd been defrauded, I'd never be standing here now; I would have been in that witness chair talking as fast as the next witness." (Tr. 1859-1860)

Here counsel for the appellant Nemec stated to the jury that he and his father were investors in

Crescent City. He was arguing the case to the jury as well as testifying. Although the Government took no exception to this argument, Government counsel were entitled to reply to it in a vigorous and forthright manner and to comment upon the chain of evidence showing the fraud in strong vigorous terms and would be derelict in their duty for failure to do so.

APPELLANT DAWSON'S ASSIGNMENTS OF ERROR

The appellant Dawson's assignments of error will be discussed in the order in which they are set forth in the appellant's brief.

ARGUMENT

I. *Answer to Appellant Dawson's Assignment of Error No. 1, viz., That the Verdicts are Contrary to the Law and the Evidence. The Evidence is Insufficient to Support the Verdicts.*

The trial judge, in summing up the evidence as to Dawson on the Motion to Dismiss, summed up the case as follows:

> "Mr. Redmond testified he met Mr. Dawson in September, 1945, and that's been gone into, as to what was done as to the employment of Mr. Redmond as an engineer for the Northwest Mining and Engineering Company. My notes show that Mr. Dawson told Mr. Redmond that he was an associate of Mr. Nemec in mining operations at Sierra City. Mr. Schnell saw Mr. Dawson and Mr. Nemec in 1946 and talked with them regarding the Mammoth Channel. He met them in a hotel in Chico, California. Mr. Smith met

Mr. Dawson near the operations of this Northwest Mining and Engineering Company in the spring of 1946 near Magelia, and Mr. Dawson asked about leasing the Genii Mine. Mr. Nemec was with Mr. Dawson at that time, and Mr. Dawson at that time told Mr. Smith that they were locating claims in the county, that they had located a group—no, that they were backed by a group of investors from Hanford. Mr. Dawson again talked with Smith in California in December, 1946 about the Genii Mine, and offered Mr. Smith at that time a job and a salary and an automobile if he would lease the mine and let Mr. Dawson have it. Of course, there isn't any evidence, as I understand it, definite evidence that he was leasing the mine for the Northwest Mining and Engineering Company, but the only association it is shown from the evidence that Mr. Dawson had, or the only reason he had to be in this particular area of California over a long period of time, was in some connection with Mr. Nemec's enterprise. There isn't any other evidence from which any other inference could be drawn.

"Mr. Helton saw Mr. Dawson, Rector and Nemec in California. Dawson told Helton he was a mining scout; he told him his company had joined forces with Dr. Rector, who was using his new knowledge gained at Hanford on the extracting of gold; then the newspaper article which Mr. Helton wrote, which he read back to Mr. Nemec, Rector and Dawson; and then of course there is Dr. Rector's testimony which has been gone into in considerable detail, and indicates that Mr. Dawson knowingly at least to some substiantial extent entered into what Mr. Rector testified was a scheme or a plan to make it falsely appear that Dr. Rector was an atomic scientist and a nuclear physicist, and had been in an important position in connection with the government project at Hanford. Of course, reference has been

made to Dr. Rector's testimony, that he remarked to Mr. Dawson that he was fearful that it might become known that he was only a chiropractor, and Mr. Dawson replied 'Yes, that wouldn't do at all' and according to my notes Dr. Rector testified that at one time when he was acting as superintendent of the operations of the Northwest Mining and Engineering Company, that he, Dawson, and Nemec were all drawing checks on the bank account of the Northwest Mining and Engineering Company.

"That certainly would indicate that Mr. Dawson had a very direct connection with the operations of the Northwest Mining and Engineering Company, and then I won't refer in detail to the other evidence of Dr. Rector, and I am still of the view that where a witness's testimony may be weakened by contradictions or indications that at some time during his testimony he wasn't telling the truth, or where he changes his testimony from cross to redirect, that that matter is a matter of weighing or of judging the weight that should be given to the testimony, and that's for the trier of the facts, which is the jury in this case.

"Then Mr. Fegan, the Securities and Exchange attorney, testified that he had interviewed Mr. Dawson, and that Dawson said he had known Mr. Nemec for 25 years, and was working with him to set up this mining enterprise. Mr. Dawson wasn't of course definite; he said that he wasn't a partner, that he wasn't an officer of the company, but I have this note, that he said that he was associated with Frank Nemec, and that they would cut the pie when they had—at some stage of their proceedings, at any rate, would cut the pie. Now, from that I think there's ample evidence there to warrant submission of the case to the jury as to Mr. Dawson being a member of this conspiracy; and as to the other counts of the information, or rather the indictment, it has been held that a scheme devised to

use the mails to defraud is a conspiracy in effect, whether or not a conspiracy is specifically charged, and that the same rules of evidence apply, so that if one is a member of and participates in a scheme, and one of the members of that, a party to the scheme, does make a mailing, I might say this, that it must be a scheme that reasonably is of such a character that use of the mails will be required, and the mails are used by one who is in the scheme, that the others are bound by it, and I think it seems to me that it would be impossible to make a distinction here, that Mr. Dawson would either have to be considered a member of the conspiracy, I'm talking now of substantial evidence, if I leave him in the conspiracy I must leave him in the substantive counts, or he must be left out of all of them. I don't think there could be any distinction drawn between the first count and the later substantive counts." (Tr. 1154-1158)

Dawson did not make any sales. He was not employed by the Company for that purpose, but was engaged as a mining scout and a local manager who was to run the affairs of the Company locally. After the trial judge held there was enough evidence to hold Dawson as a defendant, the following additional evidence, submitted by the defendants, strengthened the case against Dawson by his acting participation:

Frederick H. Vahrenkamp testified he was engaged by Mr. Dawson as an engineer for the Northwest Mining and Engineering Company at Sierra City. (Tr. 1185) Dawson then proceeded to take the mining engineer, Vahrenkamp, to the operations at Sierra City, where they met the appellant Nemec. (Tr. 1185)

Dawson himself stated as follows in his own testimony:

> "Q. Well, how were you to 'cut the pie' with Mr. Nemec, then?
>
> A. Well, that phraseology of cutting the pie, it was mentioned I believe to an S. E. C. by the name of Newton in Los Angeles, if, as and when there's a profit, then if Nemec was to cut the pie, then if that phraseology fits it, why, I was willing to take whatever slice that he was willing to give me." (Tr. 1422)

Dawson later talked with Nemec about the Mammoth Channel properties and agreed to locate claims there for Nemec. (Tr. 1424-1425)

Dawson also admitted that he had told Nemec that he tried to make a deal with Elistes Hayes for the Sierra Butte Mine and failed. (Tr. 1450) He also tried to make a deal with High Pockets Smith for the Genii Mine, but failed. (Tr. 1451) He drew checks on the Northwest Mining and Engineering Company. (Tr. 1452) The evidence, as admitted by appellant Dawson in his brief, does show Dawson's connection with the Northwest Mining and Engineering Company as a field representative, a man empowered to represent the Company in obtaining properties, leases, commitments, and even the power to write checks upon the company, although he did not go out in the field and make any sales of any claims or investment shares to any prospective purchaser. In any conspiracy case not all participants are salesmen, or managers, nor is it necessary that the appellant make a sale or be connected with all phases

of the work in order to hold him as a party to the fraudulent enterprise. If he participated, knowing of the fraud, aided and assisted in any way, he would be guilty. In this case, there was ample evidence to show that Dawson was an active principal throughout the fraudulent enterprise from the beginning at Sierra City, down to the returning of the indictment and that he was to "cut the pie" with the president of the Northwest Mining and Engineering Company, F. E. Nemec.

> II. *Answer to Appellant Dawson's Assignment of Error No. 2, viz., That the Court Erred in Permitting Evidence to be Received on the Theory of a Conspiracy on Both the Charges for Violation of the Securities & Exchange Act and of the Mail Fraud Statute. There was no Evidence Whatsoever to Support a Conviction on the Charge for Violation of Mail Fraud on the Part of the Appellant Dawson, and the Verdict Returned was on the Conspiracy Charge. Hence it Cannot be Told on What Basis the Jury Returned its Verdict."*

The appellant Dawson lays considerable stress on the case of *Krulewitch* v. *United States*, 336 U. S. 440. The appellee has no quarrel with the Krulewitch case, which was a white slave traffic case in which the transportation was completed when the conversation as to the conspiracy took place. In the Krulewitch case the conspiracy had terminated and was no longer in existence as the offense had consisted of one transportation for immoral purposes. In this case the fraud was continuing down to the date of trial and the appellants were shifting from one min-

ing and manufacturing enterprise to another in order to garner every available dollar possible from the investors. This was a long trial lasting three weeks, the record comprising 2,679 pages and consisting of 215 exhibits. In this case the Government was compelled to build the case piece by piece. In other words, in the early stages of the trial certain exhibits, such as plaintiff's exhibits 49 and 63, were admissible as against one defendant and could not be connected up until later in the case.

As the trial judge pointed out, the Government was entitled to latitude, as it could not ask its questions of all of the different witnesses at once so as to make all evidence admissible against every conspirator at one time. It must proceed to build its case bit by bit and the defendants had an ample opportunity at the time the Government concluded its case to move for judgment of acquittal and did so. By that time the Government had made a prima facie case against appellants and the exhibits were then well connected. This procedure was approved by this court in the case of *Blumenthal* v. *United States*, (CCA 9) 158 Fed. (2d) 883, at page 891, also in the case of *Rose* v. *United States* (CCA 9) 149 Fed. (2d) 755. This court held the statements made by one conspirator during the conspiracy to further the objects of the conspiracy are binding on all conspirators.

The charge of conspiracy to violate the Securities Act and mail fraud statute in single count is permissible since the conspiracy is the gist of the of-

fense. *Braverman* v. *United States*, 317 U. S. 49, *Nye & Nissen* v. *U. S.* (CCA 9) 168 Fed. (2d) 846.

III. *Answer to Appellant Dawson's Assignment of Error No. 3, viz., That the Court Erred in the Admission of Plaintiff's Exhibit 211 as Being Highly Prejudicial to the Appellant Dawson on the Theory on Which the Case was Tried.*

Since a similar assignment of error is made as to the appellant Nemec, this assignment of error is discussed more adequately in the brief commencing at page 20. Plaintiff's Exhibit 211, which was a restraining order by the State of California prohibiting the appellant Nemec from selling securities in the State of California, was admitted as against appellant Nemec. It is believed that such exhibit could not be prejudicial to the appellant Dawson as he is not a party in any way to it.

IV. *Answer to Appellant Dawson's Assignment of Error No. 4, viz., That The Court Erred in Permitting Doctor Rector to Plead Guilty in the Presence of the Jury and then to Testify Against the Appellants in the Presence of the Jury.*

In the first place the record does not indicate that Dr. Rector did plead guilty in the presence of the jury. He pleaded guilty before a jury was impaneled to try the case. There were members of the jury panel present in court at the time, but the record does not so indicate. The matter of Dr. Rector's change of plea came as follows:

"MR. ETTER: At this time, your Honor, the defendant Rector waives the reading of the in-

dictment, desires to withdraw the plea heretofore entered in the other cause, I think 4166, and enter a plea of guilty to count one of the new indictment.

THE COURT: Where is Dr. Harold Rector?
MR. ETTER: Right here.

THE COURT: Mr. Erickson, do you have something to say to that? I assume you wouldn't object to that.

MR. ERICKSON: No, I woldn't object if I could, and I have no objection to it.

THE COURT: Your name is Dr. Harold R. Rector?

DEFENDANT RECTOR: Yes, sir.

THE COURT: You understand the nature of the charge here?

DEFENDANT RECTOR: Yes, sir.

THE COURT: And have been fully advised as to your rights; it is your desire to withdraw your plea of not guilty to the former indictment in this case?

DEFENDANT RECTOR: I'm sorry—

THE COURT: I say, do you wish to withdraw the plea that you have heretofore entered of not guilty in the case?

DEFENDANT RECTOR: Yes.

THE COURT: All right; what say you now to count one of the indictment in this case, Dr. Rector?

DEFENDANT RECTOR: I wish to plead guilty.
THE COURT: All right, let the record show that Dr. Harold R. Rector has entered a plea of guilty in this case." (Tr. 24-26)

Objections were then made by Mr. Ulvestad, attorney for appellant Nemec, and Mr. Edgerton, attorney for appellant Dawson, that the procedure was in the presence of the jury. However, the jury had not yet been impaneled to try the case. They were impaneled later. (Tr. 27)

When counsel for Dr. Harold R. Rector approached the Court to ask permission to plead guilty, neither the Court nor other counsel had an idea of what he was going to do. The United States Attorney had a premonition that he might move to change his plea, but no assurance. In any event, it would be impossible to conceal the fact from the jury that Dr. Rector had changed his plea because even before the jury was impaneled and advised not to read anything in the newspapers, the newspapers had gone out with the story that Rector had entered a plea of guilty. He was mentioned in the indictment, which was a proper exhibit for the jurors to take to the jury room, and they could see his name in it. He was called as a witness on behalf of the Government—he testified in court against the co-defendants. The jurors at that stage of the proceedings certainly would know that he entered a plea of guilty as he was named in the indictment as a co-defendant. The fact that Dr. Rector entered a plea of guilty could not have been concealed from the jury with trials conducted openly and in public as they are under the American system of justice. This practice has been sanctioned in the case of *Grunberg* v. *United States*, (CCA 1) 145 Fed. 81, at p. 86.

V. *Answer to Appellant Dawson's Assignment of Error No. 5, viz., That the Defendants were Prejudiced in Having a Fair Trial Guaranteed by the Fifth Amendment to the Constitution of the United States, in that Doctor Rector was an Admitted Perjurer and was Placed on the Witness Stand by the Government to tell one Story and then to Change his Testimony in the Very Presence of the Jury.*

Certainly this assignment of error cannot be considered seriously. Appellant cites no cases to sustain his position. It is submitted that a single witness often gives contradictory testimony, that the weight of his testimony is for the trier of the fact, which is the jury. The fact is that his testimony changed during the time he was on the stand and was seized upon by the appellant Dawson's counsel and argued vigorously to the jury that they should disbelieve everything that he said. The court protected the appellant's rights thoroughly when the jurors were instructed that where a witness wilfully testified falsely as to any material matter of fact, the jury is at liberty to disregard that witness' testimony unless corroborated by other credible testimony. Appellant's argument goes to the weight of Rector's testimony rather than its admissibility. The Court gave the proper cautionary instruction. (Tr. 1918).

VI. *Answer to Appellant Dawson's Assignment of Error No. 6, viz., That the Court Erred in Instructions Given.*

Appellant's counsel at the time of the trial were satisfied with the instructions, as the trial court gave the instructions they asked for. No exception was

taken to the Court's instructions. (Tr. 1944) Therefore the instructions must be clearly erroneous and amount to a denial of due process of law to be considered now. No argument is made that they are such.

VII. *Answer to Appellant Dawson's Assignment of Error No. 7, viz., That the Court Erred in Instructing the Jury to Find as a Matter of Fact Whether the Partnership Agreements as Entered into Between the Appellants and the Alleged Victims were Within the Scope of the Securities & Exchange Act.*

In Title 15, Sec. 77 (b), Definitions, a security is defined as follows:

> "(1) The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

The appellant Dawson assigns as error that the court failed to instruct the jury as to whether or not the partnership agreements were securities within the meaning of the Act. Certainly the appellant cannot assign as error the failure of the court to instruct that these partnership agreements are securities. The

court defined what a security was and told the jury that it was for them to determine whether the interests offered were securities. It is submitted that there is ample evidence to support the jury's finding that the purchase contracts were securities, because they guaranteed each claim holder a participating interest in the net proceeds of the mining operations. The Court was extra cautious in appellant's favor in submitting the matter this way to the jury instead of instructing the jury that they were securities. Inasmuch as the securities in this case were similar to those involved and discussed in the case of *Securities & Exchange Commission* v. *Joiner*, 320 U. S. 344. the trial court followed the standards adopted by that case in proving whether or not these investment contracts were securities within the Act.

CONCLUSION

The ventures of these related operations of the Northwest Mining and Engineering Company were failures, as far as the investing public was concerned. They obtained nothing but pieces of paper entitling them to profits in the various enterprises, together with written and verbal assurances from the appellant, F. E. Nemec, that the profits would be available to them in short order.

The whole enterprise, therefore, consisted of a continuing scheme to sell to whoever was gullible enough to purchase any interest in any subsidiary of the Northwest Mining and Engineering Company, be it the Sierra City placers, Sierra City lodes, Sierra

City Mining Company, the Mammoth Channel claims, or the Crescent City Mining Company. Indeed, even at the time of the trial, the appellants were engaged in the manufacture of granium in Los Angeles, California, and at that time were promising the investors that they would soon attain success and have their money for them. The attempt of the appellants was to sell anyone any sort of a placer or lode claim, any of their operating companies, or any interest in any of their atomic processes to obtain money.

No effort was made by the Government to show how much of this money, or if any, was embezzled or stolen by the appellants. The whole theory of the Government's case was to show that the appellants and their agents made nineteen false and fraudulent representations as to the mining claims and enterprises to various investors and that the promises were false and known to the appellants to be false at the time they were made. The evidence also showed that the appellants used the mails from the beginning to the end of the scheme and, although the mailings were by the appellant Nemec, nevertheless appellant Dawson did know and could not have helped but know that the mails were used by the principal in this case. Dawson was a party to a continuing conspiracy and was responsible for substantive offenses committed by his co-conspirator, Nemec, although he may not have known of all of the substantive offenses. *Pinkerton* v. *United States*, 328 U. S. 640.

It is submitted that the record taken as a whole is remarkably free from error of any sort; that the only

exceptions taken in the whole case were as to the admissibility of certain exhibits which were later connected up with the defendants beyond any doubt and that the trial court was unduly solicitous in seeing that the defendants got a fair trial before an impartial jury under standards of fairness and justice which have been approved by this court and the highest court of the land.

Respectfully submitted,

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